IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	No. 61412-6-I
Respondent/ Cross-Appellant,	)	DIVISION ONE
v.	)	
YATIN JAIN,	)	PUBLISHED IN PART
Appellant/ Cross-Respondent.	)	FILED: July 6, 2009

Cox, J. — Yatin Jain appeals his judgment and sentence, claiming that the trial court's "to convict" instructions allowed the jury to convict him of two counts of money laundering based on his disposition of properties not charged in the information. The State properly concedes these errors. We reverse and remand for a new trial.

The Snohomish Regional Drug Task Force arrested Daren Rogers for money laundering in October 2004. Rogers decided to cooperate with the Task Force by providing information on his co-conspirators in drug transactions. Rogers identified some, and the Task Force started to investigate those individuals. Jain was among those Rogers named in January 2005.

Rogers met Jain in 2002. The two established a relationship in which Jain sold Rogers large quantities of marijuana. Rogers got out of the marijuana business in late 2003 because he knew he was being investigated. After his arrest, Rogers got back into contact with Jain at the request of the Task Force to participate in recorded conversations and to set up a controlled drug buy.

In addition to getting drug transaction information from Rogers, the Task Force conducted a financial investigation focusing on Jain. The investigation indicated that Jain spent significantly more money than could be traced to legitimate sources of income. Detective Tasha Townsend discovered that in January 2004, Jain purchased the two pieces of unimproved property that are at issue in this case at a county foreclosure sale. He paid approximately $23,300 in cash for the properties. There is no evidence that Jain made any improvements to these two pieces of property.

In 2005, Jain purchased two residences and a piece of unimproved land in Everett. He made physical improvements to these three properties and to two others he owned in Lynnwood. Jain financed these improvements with cash.

In March 2006, the Task Force executed a search warrant at Jain's residence. About one week later, on March 21, 2006, Jain quitclaimed all of his properties to his father. Thereafter, the Task Force commenced separate forfeiture proceedings against the properties, proceedings that are the subject of a recent reported decision of this court.[1]

[1] Snohomish Regional Drug Task Force v. Real Property Known as 20803 Poplar Way, No. 60312-4, 2009 WL 1543788 (Wash. Ct. App. June 1, 2009).

The State charged Jain with one count of delivery of a controlled substance, one count of possession of a controlled substance with intent to manufacture or deliver, and two counts of money laundering. The money laundering charges were tied to the two unimproved properties purchased with cash at a foreclosure sale in January 2004.

Before trial, Jain pled guilty to the controlled substance charges. A jury convicted Jain of both counts of money laundering.

Jain appeals.

JURY INSTRUCTIONS

Omission of Identification of Properties Charged in Information

Jain argues, and the State properly concedes, that the two "to convict" instructions given by the court allowed the jury to convict Jain of crimes not charged in the information. Those charges were limited to the two purchases of unimproved properties at a foreclosure sale. We accept the State's concession.

An accused person has a constitutional right to be informed of the charge he is to meet at trial and cannot be tried for a crime not charged.[2] An erroneous instruction given on behalf of the party in whose favor the verdict was returned is presumed prejudicial unless it affirmatively appears that the error was harmless.[3] A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result

[2] State v. Pelkey, 109 Wn.2d 484, 487, 745 P.2d 854 (1987); see also U.S. Const. amend. VI; Const. art. I, § 22.

[3] State v. Brown, 45 Wn. App. 571, 576, 726 P.2d 60 (1986) (citing State v. Rice, 102 Wn.2d 120, 123, 683 P.2d 199 (1984)).

in the absence of the error.[4]

In State v. Brown,[5] the information alleged that defendant Christiansen conspired with 11 identified people to commit theft.[6] The information did not allege that Christiansen had conspired with any unnamed co-conspirators.[7] The "to convict" instruction, however, allowed the jury to find Christiansen guilty if he agreed with "one or more persons" to engage in the conduct at issue.[8] Because several witnesses not named in the information testified at trial about their involvement in the conspiracy, thereby allowing the jury to return a guilty verdict by finding Christiansen conspired with one of the uncharged witnesses, the instruction was both erroneous and not harmless beyond a reasonable doubt.[9]

Here, the information charged Jain as follows:

> COUNT I: MONEY LAUNDERING, committed as follows: That the defendant, on or about the 21st day of March, 2006, did conduct a financial transaction, to-wit: the pledge, gift, transfer, transmission, trade, and disposition of ***real property known as Lot 7 River 'n Forest 4 Granite Falls, tax parcel number 00557100100700***, involving the proceeds of specified unlawful activity, to-wit: Delivery of a Controlled Substance, knowing that the property was proceeds of such specified unlawful activity; proscribed by RCW 9A.83.020, a felony.[1]
>
> COUNT II: MONEY LAUNDERING, committed as follows: That the defendant, on or about the 21st day of March, 2006, did conduct a financial transaction, to-wit: the pledge, gift, transfer, transmission,

---

[4] State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985).
[5] 45 Wn. App. 571, 726 P.2d 60 (1986).
[6] Id. at 573-74.
[7] Id.
[8] Id. at 574 n.2.
[9] Id. at 576 (citing State v. Valladares, 99 Wn.2d 663, 671, 664 P.2d 508 (1983)); see also Guloy, 104 Wn.2d at 425 (A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error.).
[1] Clerk's Papers at 67 (Second Amended Information) (emphasis added).

> trade, and disposition of ***real property known as Sec 31 Township 28 Mill Creek, tax parcel number 28053100401100***, involving the proceeds of specified unlawful activity, to-wit: Delivery of a Controlled Substance, knowing that the property was proceeds of such specified unlawful activity; proscribed by RCW 9A.83.020, a felony.[11]

During trial, the trial court admitted evidence involving properties other than the unimproved lots described in the information. Specifically, the State presented evidence of five properties not identified in the information that Jain purchased and/or improved with alleged proceeds of marijuana sales. The State also presented evidence that Jain transferred seven properties – the two specified in the information and five that were not – to his father by quitclaim deed on March 21, 2006.

The court's instructions to the jury, in contrast to the information, did not require the State to prove or the jury to find that Jain's money laundering involved any specific properties. Instead, Instruction 9 provides in relevant part:

> To convict the defendant of the crime of Money Laundering as charged in Count I, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about the 21st day of March, 2006, in an act separate and distinct from that charged in Count II, the defendant conducted a financial transaction;
>
> (2) That the transaction involved the proceeds of specified unlawful activity;
>
> (3) That the defendant knew that the property was proceeds of specified unlawful activity;
>
> (4) That the acts occurred in the State of Washington.
>
> If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty

[11] Clerk's Papers at 67 (Second Amended Information) (emphasis added).

to return a verdict of guilty.[12]

Instruction 10, the "to convict" instruction for Count II, includes parallel language.

Moreover, no instruction asked the jury to unanimously decide which property's disposition made up the crime of money laundering. And the State does not argue that it made an election, designating the Granite Falls and Mills Creek properties as those to which the money laundering charges applied.

As in Brown, the jury in this case could have returned a guilty verdict by finding that Jain committed acts not charged in the information, specifically acts relating to properties other than the Granite Falls and Mill Creek properties. The State properly concedes that it violated Jain's right to notice and a fair opportunity to present a defense. We must reverse Jain's convictions.

Because we must reverse on this constitutional ground, there is no need to consider the other constitutional basis for the challenge, the alleged lack of jury unanimity. That challenge likewise applies to Instructions 9 and 10.

On remand, there are issues that may recur. Accordingly, we address those issues to the extent this record permits us to do so.

Essential Elements of the Crime

Jain argues that the trial court's jury instructions failed to include all essential elements of the offenses charged, relieving the State of its burden of proof. We disagree.

The State bears the burden of proving every element of the crime charged beyond a reasonable doubt.[13] It follows that the "to convict" instruction must

[12] Clerk's Papers at 32.

contain every element of the crime charged.[14] Failure to include every element of the crime charged amounts to constitutional error that may be raised for the first time on appeal.[15] We review "to convict" instructions de novo.[16]

Black's Law Dictionary defines "elements of crime" as "[t]he constituent parts of a crime-[usually] consisting of the actus reus, mens rea, and causation-that the prosecution must prove to sustain a conviction."[17] Case law also identifies the statutory elements of a crime as the essential elements.[18] A proper "to convict" instruction need not contain all pertinent law such as definitions of terms, duties of the jury to disregard statements that are not evidence, and so forth.[19]

Washington's money laundering statute, RCW 9A.83.020, provides in relevant part:

> (1) A person is guilty of money laundering when that person conducts or attempts to conduct a financial transaction involving the proceeds of specified unlawful activity and:
>
> > (a) Knows the property is proceeds of specified unlawful activity.

"Specified unlawful activity" is defined as:

> an offense committed in this state that is a class A or B felony under Washington law or that is listed as "criminal profiteering" in RCW 9A.82.010, or an offense committed in any other state that is punishable under the laws of that state by more than one year in prison, or an offense that is punishable under federal law by more

---

[13] State v. Fisher, 165 Wn.2d 727, 753, 202 P.3d 937 (2009).
[14] Id.
[15] Id. at 753-54.
[16] Id. at 754.
[17] Black's Law Dictionary 559 (8th ed. 2004).
[18] Fisher, 165 Wn.2d at 754.
[19] Id. at 754-55.

than one year in prison.[2]

Delivery of a controlled substance is listed among the crimes defined as "criminal profiteering."[21] Marijuana is a controlled substance.[22]

Consistent with the above statutes, the court's "to convict" instruction, Instruction 9, provides:

> To convict the defendant of the crime of Money Laundering as charged in Count I, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about the 21st day of March, 2006, in an act separate and distinct from that charged in Count II, the defendant conducted a financial transaction;
>
> (2) That the transaction involved the proceeds of specified unlawful activity;
>
> (3) That the defendant knew that the property was proceeds of specified unlawful activity;
>
> (4) That the acts occurred in the State of Washington.
>
> If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.
>
> On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.[23]

The court's Instruction 10 for Count II includes parallel language.[24]

We cite these two instructions, recognizing that they are deficient for the other reason that we have already explained. Here, we cite them for the

---

[2] RCW 9A.83.010(7).

[21] RCW 9A.82.010(4)(q).

[22] RCW 69.50.101(d); RCW 69.50.204(c)(14); Clerk's Papers at 41 (Instruction 18).

[23] Clerk's Papers at 32.

[24] Clerk's Papers at 33.

purpose of discussing whether they are also deficient for failing to state the essential elements of the crime of money laundering.

The court's instructions also provided definitions for "financial transaction,"[25] "conducting a financial transaction,"[26] "proceeds,"[27] "property,"[28] and "knows the property is proceeds of specified unlawful activity."[29] The court also gave the jury the following definitions:

> "Specified unlawful activity" means commission of the crime of Delivery of a Controlled Substance.[3]
>
> Deliver or delivery means the actual or constructive transfer of a controlled substance from one person to another.[31]
>
> Marijuana is a controlled substance.[32]

Jain argues, without citation to any relevant case authority, that RCW 9A.83.020 shows that ***commission*** of the specified unlawful activity is an element the State must prove beyond a reasonable doubt. Specifically, he contends that "delivery of marijuana" is an essential element for the crime of money laundering in his case. According to him, the absence of this language in the "to convict" instruction relieved the State of its burden of proof in this case. We hold that the challenged instructions are constitutionally sufficient.

At oral argument before this court, Jain set forth the instruction he would

---

[25] Clerk's Papers at 34 (Instruction 11).
[26] Id.
[27] Clerk's Papers at 35 (Instruction 12).
[28] Clerk's Papers at 37 (Instruction 14).
[29] Clerk's Papers at 38 (Instruction 15).
[3] Clerk's Papers at 36 (Instruction 13).
[31] Clerk's Papers at 40 (Instruction 17).
[32] Clerk's Papers at 41 (Instruction 18).

have proposed at trial had he considered the argument then:

> Proposed Instruction for Count I:
>
> To convict the defendant of the crime of Money Laundering as charged in Count I, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about _____, the defendant delivered marijuana;
>
> (2) That the defendant knew that the substance delivered was marijuana;
>
> (3) On or about the 21st day of March, 2006, the defendant conducted a financial transaction involving the real property known as Lot 7 River 'n Forest 4 Granite Falls, tax parcel number 00557100100700;
>
> (4) The transaction involved proceeds of the commission of the crime of delivery of marijuana;
>
> (5) The defendant knew that the property was proceeds of the crime of delivery of marijuana; and
>
> (6) The acts occurred in the State of Washington.

First, to be clear, Jain expressly disclaimed at oral argument that he argues that the absence of a ***definition*** of "specified unlawful activity" in the "to convict" instructions given by the court renders those instructions constitutionally defective. Such an argument would fail because case law does not require that definitions be included in to convict instructions.[33]

Second, as we have explained, the two "to convict" instructions in this case closely track the language of the money laundering statute. More

[33] Fisher, 165 Wn.2d at 754-55.

specifically, the term "specified unlawful activity" is stated as one of the essential statutory elements in the "to convict" instructions in this case. As the instructions plainly state, the State is required to prove and the jury is required to find beyond a reasonable doubt this statutory element. Moreover, the definition of specified unlawful activity is correctly set forth in Instruction 13. Supporting definitions for delivery of marijuana are set forth in Instructions 17 and 18. Because the "to convict" instruction states the statutory element of "specified unlawful activity" and the supporting definitions for this element are also in these instructions, the challenged instructions are constitutionally sufficient except for the deficiencies we discussed earlier in this opinion. There simply is no requirement for the "to convict" instructions to contain a statement of the type of specified unlawful activity underlying the charge of money laundering.

Jain's analogy to the felony murder statute is misplaced. He argues that because WPIC 26.04, the pattern instruction for first degree felony murder, requires a statement of the underlying felony triggering felony murder in the "to convict" instruction, the same is true here. But comparing the structures of the two underlying statutes shows that the analogy fails. The first degree felony murder statute provides that a person is guilty of that crime when "[h]e or she commits or attempts to commit the crime of either [robbery, rape, burglary, arson, or kidnapping], and in the course of and in furtherance of such crime or in immediate flight therefrom, he or she, or another participant, causes the death of a person other than one of the participants."[34] The money laundering statute, in

[34] RCW 9A.32.030(1)(c) (Predicate crime for first degree felony murder is

contrast, does not provide that the defendant must commit the specified unlawful activity to be guilty of money laundering.[35] He or she need only conduct or attempt to conduct a financial transaction involving the proceeds of specified unlawful activity, knowing that the property is proceeds of specified unlawful activity.[36] As we discussed above, the instructions in Jain's case, read as a whole, required the State to prove beyond a reasonable doubt that the defendant committed specified unlawful activity, in this case delivery of marijuana. In any event, nothing in the comments to either WPIC 26.04 or WPIC 27.04 (second degree felony murder) indicates that the wording of either pattern instruction is constitutionally required.

COMMENT ON THE EVIDENCE

Jain also argues that the court impermissibly commented on the evidence and directed the jury to find an element of the offense in Instruction 13, its definition of specified unlawful activity. He argues that this instruction is analogous to that found problematic in State v. Becker.[37] We are unpersuaded by this argument.

In Becker, after the defense presented considerable evidence that a particular facility was not a "school" for purposes of a sentencing enhancement, the trial court gave the jury a special verdict form that explicitly stated the facility

---

first or second degree robbery, first or second degree rape, first degree burglary, first or second degree arson, or first or second degree kidnapping.).

[35] RCW 9A.83.020.

[36] Id.

[37] 132 Wn.2d 54, 64-65, 935 P.2d 1321 (1997).

was a school.[38] The verdict form constituted an improper comment on the evidence because it removed a disputed issue of fact from the jury's consideration.[39] Here, the court instructed the jury that "'Specified unlawful activity' means the commission of the crime of Delivery of a Controlled Substance."[4] Unlike the instruction in Becker, this is a straightforward legal definition under the appropriate statute.[41] Neither party presented evidence or argument that a crime other than delivery of a controlled substance was the alleged predicate "specified unlawful activity" for Jain's money laundering. The court's instruction here did not direct the jury to find that specified unlawful activity had occurred, only that the specified unlawful activity at issue in this case was delivery of a controlled substance.

We reverse the judgment and sentence and remand for a new trial.

The balance of this opinion has no precedential value. Accordingly, pursuant to RCW 2.06.040, it shall not be published.

ER 404(b) EVIDENCE

Jain argues that the trial court abused its discretion in admitting two types of ER 404(b) evidence. First, he argues that the trial court should not have allowed evidence that he committed delivery of marijuana in 2005, after he purchased the Mill Creek and Granite Falls properties in 2004. Second, he argues that the court should not have admitted evidence of money laundering

---

[38] Id. at 58-60.
[39] Id. at 65.
[4] Id.
[41] See RCW 9A.83.010(7); 9A.82.010(4)(q).

involving properties not listed in the information as evidence of a common plan or scheme.

ER 404(b) provides that evidence of prior crimes, wrongs, or acts is not admissible if it is offered to establish a person's character or to show he acted in conformity with that character.[42] Relevant evidence may be admitted, however, to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.[43] "Evidence is relevant and necessary if the purpose of admitting the evidence is of consequence to the action and makes the existence of the identified fact more probable."[44]

Before admitting evidence of prior acts under ER 404(b), the trial court must find by a preponderance of the evidence that the misconduct occurred, identify the purpose for which the evidence is sought to be admitted, determine whether the evidence is relevant to prove an element of the crime charged, and weigh the probative value against the prejudicial effect.[45] This analysis must be conducted on the record.[46] If the court admits the evidence, a limiting instruction must be given.[47] A trial court's admission of evidence is reviewed for abuse of discretion.[48]

We are somewhat hindered in our analysis of this claim because the

---

[42] ER 404(b); State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995).
[43] ER 404(b).
[44] Powell, 126 Wn.2d at 259.
[45] State v. Foxhoven, 161 Wn.2d 168, 175, 163 P.3d 786 (2007) (citing State v. Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002)).
[46] Foxhoven, 161 Wn.2d at 175.
[47] Id.
[48] State v. Magers, 164 Wn.2d 174, 181, 189 P.3d 126 (2008).

ruling of the trial court on the motions prior to trial was apparently in an e-mail, which is not in the record before us. In saying this, we do not discourage the use of e-mail. Our point is that neither party made the e-mail part of the record on appeal.

It is undisputed from the record that we do have that the court did not give the jury a limiting instruction, as required. Beyond that, there is really nothing we can say without speculating. The colloquy of the court and counsel is in the record. But without the benefit of the court's ruling, we decline to say anything more about the court's ruling.

Our purpose in bringing this issue to the attention of the court and counsel is to remind all that the briefs of the parties on appeal raise issues about admissibility that are likely to recur on remand. Because these matters have been extensively briefed on appeal, there should be no surprises on remand.

SUFFICIENCY OF EVIDENCE

Lastly, Jain argues there was insufficient evidence to support his conviction for money laundering. We address this question to make clear there is a basis for remand rather than dismissal.[49]

Jain argues that the State did not present sufficient evidence that he committed money laundering because it did not show that the Granite Falls and

[49] See State v. Wright, 165 Wn.2d 783, 792, 203 P.3d 1027 (2009) ("A reversal for insufficient evidence is deemed equivalent to an acquittal, for double jeopardy purposes, because it means 'no rational factfinder could have voted to convict' on the evidence presented." (quoting Tibbs v. Florida, 457 U.S. 31, 40-41, 102 S. Ct. 2211, 72 L. Ed. 2d 652 (1982))).

Mill Creek properties were purchased with proceeds from delivery of marijuana. We disagree.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.[5] A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom.[51] Circumstantial evidence is considered to be as reliable as direct evidence.[52] We defer to the trier of fact in matters of witness credibility and the weight to be assigned to the evidence.[53]

To convict Jain of laundering money, the jury had to find that he knowingly conducted a financial transaction involving the proceeds of delivery of marijuana.[54] The State is not required to prove that ***all*** proceeds in a financial transaction are the product of specified unlawful activity to establish the crime.[55]

Here, the State presented evidence that Rogers and Jain had an ongoing marijuana business relationship in 2002 and 2003. Rogers estimated that he purchased marijuana from Jain 30 times. Rogers testified that Jain had connections to people with access to hundreds of pounds of marijuana and that

---

[5] State v. Hendrickson, 129 Wn.2d 61, 81, 917 P.2d 563 (1996).

[51] State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

[52] State v. Stewart, 141 Wn. App. 791, 795, 174 P.3d 111 (2007) (citing State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980)).

[53] Id.

[54] RCW 9A.83.020(1); RCW 9A.83.010(7); RCW 9A.82.010(4)(q).

[55] See State v. Casey, 81 Wn. App. 524, 532, 915 P.2d 587 (1996) (Prosecution not required to trace all funds used in the transaction to criminal activity because requiring such proof "would allow launderers to avoid prosecution by commingling funds.").

Rogers would buy up to 50 pounds at a time from Jain. Rogers paid Jain anywhere from $2,500 to $2,800 per pound of marijuana.

The State also presented evidence that Jain paid approximately $23,300 for the two properties specified in the information entirely in cash at a county auction. Detective Townsend was not able to trace this cash as having ever been in any of Jain's bank accounts or to any legitimate source. She testified that the drug dealing business operates primarily in cash.

The detective's financial analysis revealed that in 2002, Jain earned approximately the same amount of money that he spent. For 2003, however, the detective concluded that Jain had spent about $9,000 more than could be accounted for by legitimate sources of income. In 2004, the gap between legitimate income and Jain's expenditures grew to approximately $75,000.

Additionally, the jury heard evidence of a wiretapped conversation between Rogers and Jain that occurred on March 2, 2006. In the conversation, Jain proposed a sale of property to Rogers and explained that through the sale, Rogers could "[g]et rid of some of that black money and stuff. It's hard to get rid of." Jain then stated, "[T]hat's why I got into properties."

The State presented evidence that Jain sold the two properties to a relative by quitclaim deed in March 2006.

The above evidence is sufficient to support Jain's conviction. A jury could reasonably infer that such a large cash expenditure by Jain to purchase the two properties at foreclosure sale involved the proceeds of delivery of marijuana. A

detailed financial investigation could find no apparent connection to a legitimate source for the cash, and the purchase was made shortly after the time when Jain was known to have participated in the sale of hundreds of pounds of marijuana. It is also reasonable to infer that Jain conducted a financial transaction involving the proceeds of his marijuana sales when he disposed of the properties in 2006.

Jain's argument rests primarily on the fact that Rogers, as an informant, had many incentives to fabricate his testimony and that the evidence he provided is "uncorroborated." But this court defers to the trier of fact in matters of witness credibility and the weight to be assigned to the evidence.[56]

We reverse the judgment and sentence and remand for a new trial.

Cox, J.

WE CONCUR:

[56] Stewart, 141 Wn. App. at 795.